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No. 95-1744

In the Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether either the separation-of-powers doctrine or the Due Process Clause was violated by the application to this case of 10 U.S.C. 2798, which repeals the United States' waiver of sovereign immunity based on the content of navigational aids prepared or disseminated by the Defense Mapping Agency, and which was enacted while petitioners' claims were pending in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 75 F.3d 134. The opinion of the district court (Pet. App. 4a-19a) is reported at 888 F. Supp. 543.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996 (Pet. App. 22a), and the petition for a writ of certiorari was filed on April 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2798 of Title 10 provides:

> (a) CLAIMS BARRED.—No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency.
>
> (b) NAVIGATIONAL AIDS COVERED.—Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the Defense Mapping Agency prepares or disseminates navigational aids.

The note following the text of Section 2798 provides, in pertinent part:

> Section 2798 of title 10, United States Code, * * * shall take effect on the date of the enactment of this Act [Oct. 5, 1994] and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date.

STATEMENT

1. The Defense Mapping Agency (DMA) is a Combat Support Agency of the United States Department of Defense. 10 U.S.C. 193(f)(4). Its mission is to "improve means of navigating vessels of the Navy and the merchant marine by providing, under the authority of the Secretary of Defense, accurate and inexpensive nautical charts * * * for the use of all vessels of

the United States and of navigators generally." 10 U.S.C. 2791. The DMA's primary role is military:

> Its mission is to produce topographic, aeronautical and nautical maps, charts and other publications in hardcopy and softcopy versions to support United States warfighters. However, many of its products are used by mariners navigating vessels around the world.

140 Cong. Rec. S5065 (daily ed. May 3, 1994). See also S. Rep. No. 282, 103d Cong., 2d Sess. 231 (1994).

Petitioners are the owner and operator of the ore-carrier Hyundai New World, the owner of the ship's cargo, and the insurance underwriters of the ship's cargo. On March 31, 1987, the Hyundai New World ran aground on a shoal off the coast of Brazil as it sought to enter in the Baia de Sao Marcos. Petitioners sued the United States for various tort damages, claiming that the grounding was caused by DMA's negligence in failing to update a navigation chart that no longer accurately reflected the position of the shoal. Jurisdiction was founded upon the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.* See Pet. App. 4a-7a; C.A. App. 23-30.

The chart on which petitioners claimed the Hyundai New World had relied was published by the DMA on April 23, 1983. It states that it is a reproduction of a chart produced by the Brazilian government on the basis of surveys done by the Brazilian Navy in 1974. Pet. App. 6a. Petitioners also claimed that the DMA had failed to update the information in the chart in any of the weekly notices to mariners that it produces that update existing charts with new hydrographic information. In 1984, petitioners claimed, the Brazilian government performed new hydrographic surveys

in the Baia de Sao Marcos that indicated that the shoal on which the Hyundai New World later foundered had extended northward. As a result, water depths were now between 14 and 17 meters in areas where the DMA's chart indicated depths were between 25 and 38 meters. Petitioners claimed that, although the DMA had received charts from the Brazilian government and notices from the British government indicating those changes, the DMA had not published that information before the grounding of the Hyundai New World. *Id.* at 6a-7a.

2. On April 22, 1994, after completion of discovery, the government moved to dismiss the action on the grounds that the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity, 28 U.S.C. 2680(a), precluded petitioners' claims. The district court denied that motion, ruling that the discretion exercised by the DMA merely concerned technical matters. See C.A. App. 249-261.

Two days before the government's motion to dismiss was filed, the Department of Defense (DoD) transmitted to Congress its draft of the 1995 Department of Defense Authorization bill, which contained a repeal of the waiver of sovereign immunity for lawsuits relating to DMA charts.[1] Although DoD's draft bill did not contain any provision stating that the repeal would apply to cases pending at the time of its enactment, see C.A. App. 374-375, as enacted by

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[1] Petitioners err in describing the legislation as part of an "appropriations bill." Pet. i, 4. The bill was a Department of Defense Authorization bill. In any event, "Congress * * * may amend substantive law in an appropriations statute, so long as it does so clearly." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

Congress and signed by President Clinton on October 5, 1994, the bill provided that the repeal of the waiver of sovereign immunity would apply to pending cases, see *id.* at 376, 378-379.[2]

The statute repealing the waiver of sovereign immunity is codified at 10 U.S.C. 2798. In pertinent part, it provides that "[n]o civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency." 10 U.S.C. 2798(a). It also provides that the Act "shall take effect on the date of the enactment of this Act * * * and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date." 10 U.S.C. 2798 note.

In its legislative proposal, DoD stated that the repeal of the waiver of sovereign immunity with respect to the content of DMA charts served the following purposes:

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA

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[2] Contrary to petitioners' description of the statute as "stealth legislation" (Pet. i, 6-7, 13), the DoD's initial proposal was published in the Congressional Record on May 4, 1994 (see C.A. App. 381), the revised bill was published in the Senate Report on June 14, 1994 (see *id.* at 376, 378-379), and the final bill was published in the Conference Report on August 12, 1994 (see *id.* at 383, 384-385). See also *id.* at 268-275 (noting that the Justice Department attorneys involved in this litigation were not aware until after the bill's passage that a bill was under consideration that would affect this case).

> exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.
>
> For example, in the case of *Hyundai Merchant Marine Co., Ltd. et al. v. United States*, the HYUNDAI NEW WORLD, a 200,000 deadweight ton bulk cargo carrier, stranded in the Bay of Sao Marcos, Brazil, on 31 March 1987, resulting in a total loss of ship and cargo. The ship owner, cargo owners and underwriters of same, sued the United States for negligence alleging that the navigators of HYUNDAI NEW WORLD were using [a] DMA chart * * * (A DMA facsimile of a Brazilian chart) containing errors and omissions which were the cause of the stranding. The potential damages to date are estimated at $60 million.
>
> Th[e] proposed statutory language would make it clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information, in whatever form, primarily for use of U.S. warfighters, are expressly exempt from any claim or cause of action.

140 Cong. Rec. S5065 (daily ed. May 3, 1994). The Senate Report on the bill, in turn, explained:

> The committee recommends two provisions, requested by the Administration, related to DMA maps and charts.
>
> * * * * *

> The second provision would make it clear that the United States has not waived sovereign immunity with respect to lawsuits based upon the content of DMA maps and charts. Claims against DMA are prohibited under the Federal Tort Claims Act,[3] but an issue has arisen as to whether the Suits in Admiralty Act (46 U.S.C. 741 et seq.) provides an independent jurisdictional basis for lawsuits against DMA. The provision recommended by the committee would make it clear that the government has not waived sovereign immunity with respect to claims based upon allegations concerning the content of DMA maps and charts.

S. Rep. No. 282, *supra*, at 231-232.[4]

3. The government thereupon moved to dismiss based on 10 U.S.C. 2798, the new statute. The district court granted that motion. Pet. App. 4a-19a. It held that Section 2798 clearly applied to the DMA's alleged failure to amend the chart and to issue a notice correcting the information in the chart. *Id.* at 10a. Thus, the district court held, the United States enjoyed sovereign immunity with regard to petitioners' claims. *Id.* at 11a. The court rejected petitioners'

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[3] The committee was apparently referring to the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), which has been held to apply to cases brought under the SAA. See, *e.g.*, *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 116 S. Ct. 1823 (1996); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989). At the time of the Senate Report, the district court in this case had not yet ruled on whether that exception applied to this case.

[4] The first provision, which became 10 U.S.C. 2797, prohibited unauthorized use of the name, initials, or seal of the DMA.

claim that the application of Section 2798 to pending claims violated the separation of powers. *Id.* at 11a-17a. The court noted that, under this Court's decision in *Robertson* v. *Seattle Audobon Society*, 503 U.S. 429, 438 (1992), "when Congress compels 'changes in law, not findings or results under old law[,]' it acts within its constitutional authority." Pet. App. 14a. And, the court stated, nothing in Section 2798 "purport[s] to direct any particular findings of fact or applications of law, old or new, to fact." *Ibid.* (quoting *Seattle Audobon Soc'y*, 503 U.S. at 438). Nor, the court held, did the new statute impermissibly reopen a final judgment, because there was no such judgment in this case. *Id.* at 15a-17a. Finally, the court rejected petitioners' claim that the new statute violated the Due Process Clause by depriving them of a "vested right." *Id.* at 17a. The court noted that "[a] cause of action * * * 'is inchoate and affords no definite or enforceable property right until reduced to final judgment.'" *Id.* at 17a-18a (citation omitted).

4. The court of appeals summarily affirmed, Pet. App. 1a-3a, "on the basis of [the district court's] comprehensive and well-reasoned opinion," *id.* at 3a.

ARGUMENT

1. The United States is immune from suit except where it has consented to be sued, "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Testan*, 424 U.S. 392, 399 (1976). It is for Congress to determine whether and to what extent to waive such immunity. *Dalehite* v. *United States*, 346 U.S. 15, 30 (1953); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). As petitioners recognize (Pet. 7), by enacting

Section 2798, Congress clearly repealed the waiver of sovereign immunity for tort claims codified in the Federal Tort Claims Act, 28 U.S.C. 2680(a), and the Suits in Admiralty Act, 46 U.S.C. App. 742, with regard to claims based on the contents of maps, charts, books, notices and other publications disseminated by the Defense Mapping Agency.

2. Contrary to petitioners' claim (Pet. 8-11), application of Section 2798 to petitioner's case does not violate the separation-of-powers principle. Under that principle, Congress may not reopen or direct the reopening of a final judgment. See *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995). But, as this Court has observed in *Plaut* (see *ibid.*), the separation-of-powers principle does not forbid Congress from revising the judgment of an Article III court while that judgment is still pending on appeal:

> Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.

That is because "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the [judicial] department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" *Plaut*, 115 S. Ct. at 1457. If Congress can change the applicable law after a judgment has been issued and a

case is on appeal, *a fortiori*, Congress can change the underlying law so as to affect cases, like the instant case, in which an action has been filed but which has not proceeded to judgment.

Petitioners' reliance upon *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), is misplaced. The Court in *Klein* "refused to give effect to a statute that was said '[t]o prescribe rules of decision to the Judicial Department of the government in cases pending before it.'" *Plaut*, 115 S. Ct. at 1452 (quoting 80 U.S. (13 Wall.) at 146). But, as this Court has noted, the prohibition in *Klein* "does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 115 S. Ct. at 1452-1453 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). In this case, Congress has amended applicable law governing sovereign immunity, and has not done anything "to direct any particular findings of fact or applications of law, old or new, to fact." *Seattle Audubon Soc'y*, 503 U.S. at 438.

Moreover, in *Klein*, "Congress overstepped its bounds by granting the Court of Claims jurisdiction * * *, while prescribing a rule of decision that left the court no adjudicatory function to perform." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 392 (1980). In the instant case, by repealing its earlier waiver of sovereign immunity, Congress has provided that there is no judicial jurisdiction whatever to consider that question.[5]

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[5] Petitioners claim (Pet. 7, 10) that Congress effectively has acted for the purpose of disposing of the instant case, because it is the only pending suit against the United States based on the DMA's charts. The United States had previously been sued based on DMA's activities. See *Empire Transport Inc.* v. *United States*, 1974 A.M.C. 1517 (S.D.N.Y. 1974), aff'd, 524 F.2d 1 (2d Cir. 1975); *United States Lines, Inc.* v. *United*

3. Application of Section 2798 to this case does not violate the Due Process Clause, contrary to petitioners' claims. See Pet. 11-13. The new statute does not affect a contract right or any other vested right. The general rule is that a legal claim creates no definite or enforceable property right until reduced to final judgment. *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (collecting cases); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), cert. denied, 335 U.S. 887 (1948). In arriving at a judgment, judges must apply the law in effect on the date of decision, even though that law was enacted after the events giving rise to the suit. *Plaut*, 115 S. Ct. at 1447; *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1501 (1994). Even when a final judgment has been entered, if the case is pending on appeal the appellate court must apply the new law:

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the

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States, 79 Civ. 4209 (IBC) (unpublished 1983 opinion of Southern District of New York, dismissing action against government); *Rappenecker* v. *United States*, 509 F. Supp. 1024 (N.D. Cal. 1980). While the instant lawsuit may have been the impetus for Congress's action, the statute applies broadly to all similar claims in the future.

> present case, has been expressed, I know of no court which can contest its obligation.

United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1802).

Petitioners assert (Pet. 11-13) that, because Section 2798 was enacted after petitioners had commenced suit, the rights granted by the SAA had "vested," and Congress was no longer free to extinguish petitioners' cause of action. However, "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver* v. *Silver*, 280 U.S. 117, 122 (1929), even when such "legislation readjusting rights and burdens * * * upsets otherwise settled expectations," *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). See also *New York Central R.R.* v. *White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'") (citation omitted).

The cases cited by petitioners (Pet. 11-12) concern either contractual rights, property rights, or rights to money which, under this Court's decisions, had already accrued or "vested" at the time suit for those sums had commenced. For example, in *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913), this Court reviewed a lower court decision upholding a State's repeal of a statutory remedy that provided compensation to property owners for consequential damages resulting

from grading of public streets. The statutory basis for the State to perform grading operations had been coupled with the right of the affected property owners to consequential damages. The underpinning for the Court's statement that "[t]he right to compensation was a vested property right," was that "the action [was] *neither for a tort*, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made." *Id.* at 157-158 (emphasis added). See also *Forbes Pioneer Boat Line* v. *Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922) (a state legislature cannot take away from a private party a right to recover money that becomes due when the act is passed); *Coombes* v. *Getz*, 285 U.S. 434, 440-441 (1932) (liability created by state constitutional provision was concededly contractual in nature, and attempted repeal of it while an appeal was pending violated the Contracts Clause of the federal Constitution); *Steamship Co.* v. *Joliffe*, 69 U.S. (2 Wall.) 450, 457 (1865) (provision for "half-pilotage fees" was quasi-contractual and liability thus arising is said to be a liability upon an implied contract). Because rights arising out of a tort claim do not vest until there is a final judgment, the Due Process Clause is not implicated by application of Section 2798 to petitioners' claims.[6]

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[6] Petitioners' reliance (Pet. 12-13) on the decision of the European Court of Human Rights in *Pressos Compania Naviera S.A.* v. *Belgium*, Case 38/1994/485/567 (Nov. 20, 1995), published in *European Transport Law* [1996] at 71-90, is thus misplaced. Unlike law in this country, Belgian tort law provides that "a claim for damages [is] in principle generated when the damage occurred, as the judicial decision merely

Even if the legislation in this case were retroactive in nature, retroactive legislation "in the sphere of economic policy" satisfies the Due Process Clause provided that the legislation is "supported by a legitimate legislative purpose furthered by rational means"; in such instances, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *United States* v. *Carlton*, 114 S. Ct. 2018, 2022 (1994) (citations omitted). Section 2798 is supported by such a legitimate purpose. As Congress recognized (140 Cong. Rec. S5065 (daily ed. May 3, 1994)):

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.

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confirm[s] its existence and determine[s] the relevant amount," *id.* at 83 (¶ 30), and a claim is thus an "asset" and a "possession." *Id.* at 83-84 (¶ 31). European notions of sovereign immunity are distinct from doctrines of sovereign immunity in this country, including the fact that immunity issues turn on a balancing of "the demands of the general interest and the requirements of the protection of [plaintiffs'] right to the peaceful enjoyment of their possessions [the tort claims]." See *id.* at 81 (¶ 25), 82-83 (¶ 28). In the United States, the judgment whether sovereign immunity is to be waived is left entirely to Congress.

Apprised of an actual lawsuit seeking tens of millions of dollars for the grounding of a Korean ship in a Brazilian bay, which was alleged to have been caused by the ship's reliance on a DMA reprint of a Brazilian chart based on Brazilian surveys done 13 years earlier, Congress acted reasonably in determining that the United States should not risk exposure to "unlimited liability," 140 Cong. Rec. S5065 (daily ed. May 3, 1994), as an insurer of the accuracy of various DMA charts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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